VIRGINIA LAW REGISTER

R. T. W. DUKE, JR., *Editor.*

HOMER RICHEY AND MINOR BRONAUGH, *Associate Editors.*

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The 1914 Session of the General Assembly.

We regret to see the use of the word "Legislature" for our General Assembly. We have no "Legislature" in Virginia and it is to be regretted that the press and our people generally should not confine themselves to the use of the proper and more dignified term. But call it by what name you will, the session, of which some two weeks will have elapsed when this number of the REGISTER reaches our readers, is one in which matters of great importance are to be considered.

A judge of our Supreme Court of Appeals is to be elected. It is to be sincerely hoped that only merit, high character and great ability will be considered in making this choice. Several *nisi prius* judges are to be elected: the same rule should apply to their choice as to that of the appellate judge.

The matter of tax reform is to be taken up—one of great and far reaching importance, but belonging more to the political than to the legal side of legislation.

Then the question of reform in legal procedure is to be considered. We have given our views upon this question in the October, 1913, number of the REGISTER, p. 469. We believe the choice of the members of commission to do this work should be made by our Supreme Court, as indicated in the views expressed in that editorial. We have called attention to the great need of amending the statute in regard to the probate of wills in the clerk's office; of amending the act providing for recovery of judgment in cases of tort by notice and motion, so as to make the act apply to corporations as well as individuals; to the importance of making some provision as to the proper indexing of depositions taken *de bene esse*; and we think the time has come for a revision of our laws as to dower and curtesy, as to the life of a judgment lien, and as to our method of instructing juries. But

the first act the General Assembly should adopt, if it has not adopted it before this number appears, is to recommend an amendment to the Constitution extending the session of the Assembly to ninety days. It is almost a physical impossibility to accomplish any good legislation in the limited time under the present Constitution. Haste and sometimes something worse than haste has characterized some of the legislation enacted of recent years. We do not believe it is the fault of the members of the General Assembly, but rather their misfortune. They are nothing but mortals and in the limited time allotted to them they must necessarily depend upon their committees; the committees are pressed for time and ill-considered legislation must necessarily follow. Important measures are blocked by a very few men and legislation much needed is carelessly composed, recklessly amended and its usefulness impaired, if not destroyed. We believe the people would approve such an amendment and it should be put in the course of passage as soon as possible.

The California Plan.

And speaking of the General Assembly, is not the plan adopted by the State of California and which we understand will be adopted by New York, an excellent method of disposing of business in legislative bodies? This plan is to have the Legislative Assembly meet, bills be introduced and then the body take a month's recess, during which time the committees hold public hearings on all bills which have been introduced. New Jersey has adopted another equally wise rule; i. e., that ten days must elapse after the second reading of a bill before final action can be had thereon. If we could only extend our legislative session and adopt rules of this character we believe the result would be most salutary to the body politic.

Secondary Authority.

We have read with interest, needless to say with much pleasure; Professor Lile's very able address delivered as president of the Virginia Bar Association at its 1913 meeting. We cannot agree, however, with all the conclusions of the learned

gentleman. It seems to us the curse of the day is the exaltation of the so-called "primary" authority. In other words, the tendency to follow the decisions of courts without regard to their ability and to regard precedents rather than principles. We agree with President Lile that many of the encyclopedias and text-books of today are the product of paste pot and scissors rather than of brains; but many of the decisions of some of the highest courts of this Union—often quoted as authority—are the products, alas! of neither brains, paste pot nor scissors, but rather of the ink wells and fingers of those who do not know how to use either.

And yet on the other hand there are text-books which emanate from brains and cultivation, which taking the thousand and one decided cases compare, digest and as far as possible attempt to bring them into harmony, and then drawing the writer's own conclusions give a clear, distinct and able presentation of what the law ought to be, by which a court untrammelled by the binding decisions of its own appellate tribunals may be guided. Where could a court go for better information to lead it into right paths upon a question concerning Municipal Corporations than to the pages of Dillon's great work? Would Professor Lile advise his students upon a nice question of evidence to go first of a digest or to Greenleaf, Wigmore, or Chamberlayne? As well advise a traveller to follow the meanderings of a brook rather than the main plain road to reach the destination to which he is travelling, or to follow the meteors rather than be guided by the polar star. The curse of law teaching, of legal decisions, of brief making, is the multiplication of cases—the following of the rivulets instead of seeking the fountains: overloading the great underlying principles of right with the opinions of judges from Oklahoma and Utah and California and Maine and Texas and heaven knows where, until the very hands tire with hauling down the volumes and the brain reels from considering lengthy essays beginning anywhere and ending nowhere and in which a mite of wisdom is concealed in a multiplicity of words. Even the hack writer does a vast benefit to the profession and the weary courts when with his scissors and paste pot he cuts and collates and condenses and arranges this vast mass of scattered law and gives it some sort of shape and semblance, even if he does make it

cohere with the dollars and not the eternal principles of justice before his eyes.

We cannot agree with Professor Lile that the tendency of the bench and bar is to exalt secondary authority. We think the reverse is the case. The tendency today is to multiply cases, depend upon cases, quote cases and decide questions by the weight of the reported cases—a proceeding which is not unlike that of the illustrious Wouter Van Twiller in the celebrated case of Schoonhoven *v.* Bleecker. To minister to this tendency we have the innumerable digests, reported cases, "short cuts" and "long cuts" to the law. An examination of most briefs will show that where one text-book is quoted forty cases are cited. We had sent to us some time ago a learned, lengthy and elaborate brief upon a question which did not seem to us of very great intricacy. *One hundred and eighty-six* cases by actual count were cited in this brief. What court or judge could be expected to examine one-half of them? Now the opinion of even a hack writer who has examined such a mass of cases upon a given question and drawn a conclusion would be worth something, just as the argument of a lawyer who cites these cases and makes out his side of the case from them is listened to and duly weighed by the court, even though the court might know that the lawyer had a contingent fee in the case. We must have something of this sort or be overwhelmed in the vast ocean of annual decisions.

Professor Lile offers no remedy for the multiplication of "primary" authority. We believe the remedy lies in the courts themselves, who should disregard decisions of other courts and rely upon their own sound judgment of which is right or wrong. We are aware that decisions of other courts are called merely "persuasive" authority. Then why cumber briefs and opinions with "persuasions" as to what is right or wrong? If a case cannot be found in our own jurisdiction upon a given question, then let our own court decide it according to its own views of what is just and right and not try to bolster up justice with props which are not needed. Certainly our own court is just as able to determine what is law for this State, without appealing to Kansas or Missouri for aid. Let decisions conflict as much as they will outside of our own jurisdiction, as long as there is no conflict of *authorities* in our own borders. We know that this sounds

fearfully radical, but something like this must be done or chaos will be the result in a few decades.

Whilst differing with Professor Lile as to his views on "primary" and "secondary" authority we give unqualified praise to his suggestions as to brief making, and especially as to his conclusion that "special prominence should be given to argument on principle and reason in advance of the discussion of the authorities." This is exactly what we have been contending for in this article. Our own Court of Appeals in Rule IV* has suggested a way out of the difficulty which too many of us forget and of which the Court is too kind-hearted to remind us sharply. We wish every lawyer in the State would read and take to heart Professor Lile's suggestions and also just before he commences a brief, read over Rule IV and be guided by its terms. Sunlight would then shine through the fog which is rapidly overwhelming us and the burden of the courts and lawyers be materially lightened.

Parol Agreement and the Negotiable Instruments Law.

The possibility of piling a Pelion upon an Ossa of cases can be easily seen in the case of Alphin *v.* Lowman, decided by our Supreme Court, Nov. 20, 1914, for never has there been a subject of greater controversy and contrariety of opinion than upon that statute known as the Statute of Frauds. And yet that statute is very plain and it would seem to the ordinary observer to be easy of interpretation. But beginning with the case of Thomas *v.* Cook, 8 Barn. & C. 728, down to the present case the question of what promise is or is not within the statute has been the subject of innumerable decisions and our Court in deciding the case under discussion says that it "is not without hesitation" that it reaches its conclusion. In rendering its decision it overrules Wolverton *v.* Davis, 85 Va. 64, which was decided by only three judges. The reason of the Court's hesitation is easily seen, for the cases pro and con are almost innumerable and some of them

*"In all cases it is recommended to the gentlemen of the bar to select and cite only the most pertinent authorities."

taking the view opposite to that our own Court now takes, are of great weight. Our Court seems to have carefully considered and weighed both sides—not with Van Twiller's scales, but with sound logic and judgment—and thrown the weight of its own judgment with Thomas *v.* Cook, which seems to have been followed by the greater number of authorities. The case in brief is this. Gillespie drew two notes for $3,000 and $5,000 and Lowman and Blakey were approached by Alphin and requested to unite with him as joint payees or endorsers on these notes. To induce them to unite with him he assured them they would never have a dollar to pay as long as he has a dollar's worth of property. Relying upon this promise they united with him. The notes were not paid and Lowman and Blakey's property was sold under an execution upon a judgment upon the notes. They then sued Alphin and objection was made to the introduction of testimony regarding Alphin's promise, on the ground that it was to pay the debt of another and therefore within the statute. Reliance was had to maintain this objection to the case of Wolverton *v.* Davis, *supra,* and § 68, of the Negotiable Instruments Law, which reads: "As respects one another endorsers are liable *prima facie* in the order in which they endorse; but evidence is admissible to show that as between or among themselves they have agreed otherwise. Joint payees or joint endorsers who endorse are deemed to endorse jointly and severally."

Wolverton *v.* Davis was a case exactly in point, though in that case the sureties were on the official bond of a sheriff and one promised orally to indemnify another against loss, the Court holding in that case that the promise came within the inhibition of the statute.

But the present Court overrules that case and holds very properly, we think, that a promise of indemnity is an original promise. The defense of § 68 was very easily disposed of, the Court holding it had no application. The main defense was the Statute of Parol Agreements. The Court cites four text-books—Troop on Verbal Agreements, 20 Cyc., Smith's Leading Cases, p. 538, if that can be called a text-book, and Browne on Statute of Frauds. Three Virginia cases are quoted on the point raised as to § 68, of the Negotiable Instrument Act. Upon the other point ten cases are cited and the text-books named. Every case re-

ferred to is pertinent, but had the Court chosen so to do it could have swelled the number into hundreds. It contented itself very wisely, we think, with referring the curious to Browne, Throop and 20 Cyc.

Now taking this case upon Professor Lile's admirable suggestion upon brief making, "the principle and reason" does not seem to us to require much authority. Here was an inducement held out to Lowman and Blakey by Alphin to unite with him in endorsing these notes; here was a distinct promise and undertaking on his part to them that they should suffer no loss by reason of their endorsement. There was no promise to pay the debt of another; there was a promise to save them harmless from the consequence of an act to the performance of which they were induced by the promise of Alphin. It seems to us on "principle and reason" that this was not a case within the statute and that the decision of our own Court was justified independent of any other authority than that of justice and right reason. Judge Keith's opinion is as forceable and strong a presentation as could be well made, and we are glad to see that he is sustained by the weight of authority, though in our own judgment his decision based upon the facts was sufficient authority in itself.

Legal Aid for Poor People.

A stockbroker of South Kensington, London, England, died some time since, leaving a handsome estate, the ultimate residue of which he left as a charitable trust to establish a "Legal Aid Fund for Poor People," to assist poor English and Scottish people (Ireland also to benefit so long as she remained in the Union) in obtaining competent legal advice and assistance and the aid of the courts of law in upholding and defending their rights or property. He limited the use of the fund only to the extent that none of it should be used in any dispute between masters and workmen as to the term and condition of service contracts, commonly called trades disputes. He charged his trustees to take especial care of poor people's cases against motor

car owners in the event of injuries and to protect the poor in case of suits by or against rich or titled people.

New Zealand has long since had a law on its statute books providing for the defense of poor persons accused of crime, but it has only been put in force in the last year. In order to obtain the benefit of the act the prisoner must show that he is not able to borrow the money for his defense, or to obtain such money from his relatives or friends, and that he is not able to procure such legal aid without prepayment of the costs. The inquiry into the means of the prisoner is to be made by the magistrate in private. If the prisoner has been represented by counsel in the preliminary proceedings before the magistrates that fact is *prima facie* evidence that the accused is not without means within the meaning of the statutory regulations. Before granting a certificate for legal aid the magistrate must be satisfied that the prisoner has a defense which may reasonably and properly be set up upon his trial. The counsel is to be chosen by the judge from a list kept for that purpose. The registrar of every registry of the Supreme Court is to request the Council of the Law Society of the district wherein the registry is situated from time to time to ascertain and to forward to him the names of persons who, in the opinion of the Council, are fit and proper and who are qualified and willing to act as counsel for accused persons. The list is to be approved by the judge, who may remove or add names. The fees to be paid to counsel for the defense are to be the same as those allowed to the local Crown solicitor for the prosecution of the same person on the same charge. Provision is also made for the expenses of witnesses required by the defense.

We are not sure that the New Zealand Act would be advantageous to poor prisoners in this State. A poor prisoner without counsel generally has the judge very much on his side and has the benefit of the doubt very strongly given him.

We have always thought that some provision, however, should be made for the costs of an accused man acquitted by a jury, when approved by the judge who tried the case.

Failure to Testify and Challenges of Jurymen.

Two grave defects in our criminal law need correction at the hands of our General Assembly. One is in the failure of the law to allow at least two peremptory challenges to the Commonwealth in felony cases. It is a singular anomaly in the law which permits the Commonwealth to strike off a juryman in a misdemeanor case but gives no such right in a felony case where it is much oftener needed. The prisoner can strike off four men; the Attorney for the Commonwealth often sees one or more men on a jury whom he knows to be absolutely unfit to serve in a particular case and yet he must take them "willy nilly," although their retention will almost surely lead to a mistrial or a miscarriage of justice.

The absurdity also of refusing to allow the failure of the accused to testify in his own behalf to be used against him and positively forbidding any allusion in argument to such failure, should be corrected. The aim of a criminal trial is to acquit the innocent and convict the guilty. An innocent man need never fear the ordeal of the witness box. A guilty man always does. If a man by keeping off the stand leads a jury to believe him guilty, should they not be allowed to draw an inference from his failure to testify? What good, sensible reason can be urged for the present state of the law? Is it not against all reason? And the fact is that most juries do draw an inference from the silence of the accused, for they know of his right to testify. The fact is that in our administration of the criminal law we are a century behind the times. In tenderness towards the criminal we have hardened our hearts as to the just enforcement of the law. We have retained practically all the bars which were erected to aid him when he stood accused and upon trial was not allowed counsel. Why should we not now give the law a chance, and at least put it upon an equality with the criminal? It is about time we brought some good hard, logical common sense to the reformation of our criminal procedure.

Moral Turpitude.

The definition of legal terms has produced numerous law books and word books more or less satisfactory, but one always hails with pleasure a definition from a court. The words *moral turpitude* have at last received an authoritative definition from the United States Circuit Court of Appeals for the Circuit of New York in the case of U. S. *v.* Mylius. Edward F. Mylius is the English writer, who had served a term in a British prison for libeling King George V. of England. The libel consisted in publishing falsely the statement that King George had been married to the daughter of Admiral Sir Michael Culme Seymour before he went through the form of marriage with Queen Mary.

Mylius arrived here on September 22, 1912, and was detained at Ellis Island. On a writ of habeas corpus he was brought before Judge Noyles, who decided that as a libel might be committed unconsciously and in spite of the best efforts to ascertain the truth, its commission could not be considered as showing "moral turpitude." Since the Special Boards of Inquiry could not be expected to go behind the record to consider the special circumstances of each particular case before them, it was impossible for them to exclude Mylius, however heinous the actual libel he had been guilty of. Judge Coxe yesterday in an opinion, in which Judges Lacombe and Ward concurred, agreed with this reading of the law.

"The question," said Judge Coxe, "narrows itself down to the inquiry, Does the publication of a defamatory libel necessarily involve 'moral turpitude'? We are of the opinion that it does not. We of course do not lose sight of the extreme brutality of the libel involving as it does not only the King, but the Queen, her children, and the daughter of Admiral Seymour. But in construing these laws we should proceed on broad general lines, considering all persons equal before the law. A decision which makes the infamy of the libel dependent upon the rank of the person libeled cannot be defended either in law or ethics. If it would not involve 'moral turpitude' to publish this libel against a field laborer in Devon or a street sweeper in London, it would not involve 'moral turpitude' to publish it regarding the Lord Chancellor or even the King.

"Indirectly, such a libel may involve the crime of 'lese majeste'

or treason, but the only crime charged in the indictment is maliciously publishing the defamatory libel as stated.

"The law must be administered upon broad general lines and if a crime in its essence involves 'moral turpitude' a person found guilty of such a crime cannot be excluded because he is shown by the record to be a depraved person. It would be manifestly unjust to construe the statute so as to exclude one person and admit another convicted of criminal libel. Some libels may be considered to involve moral turpitude, but libela in its general classification does not do so.

"As pointed out by Judge Noyes, editors and publishers have often been convicted of publishing criminal libel, who were wholly ignorant of the libel. So, too, corporations have been convicted of criminal libel, but having no souls, it can hardly be said that their acts involve 'moral turpitude.' "

It is somewhat refreshing in this age of snobbery when the wealthy New Yorkers and others have been pursuing princes, counts and barons, both of the genuine and the pseudo character, to find that our judges draw no distinction between a king and the humblest laborer. Our own opinion is that the author of as dirty a libel as Mylius does not deserve to be admitted to any decent country, but certainly he was not guilty of moral turpitude in the legal criminal sense.